

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD

TTAB

Serial No. 76/613881

mine design, a d.b.a. of Amal Flores
v.
Votivo, Ltd. And Votivo, LLC

Opposition No. 91178747

mine design's Response to Defendants' Motion for Leave to Supplement Record in
Support of Motion for Reconsideration



04-20-2009

Votivo has filed a paper styled "Motion For Leave To Supplement The Record In Support Of Motion For Reconsideration." By its motion Votivo seeks to have the Board consider the Order issued on March 10, 2009 by the United States District Court, Central District of California in Case No. CV 03-6017 DDP (Ex) ("the Order").

Mine Design joins Votivo's motion to the extent it requests the Board consider the effect of the Order on issues properly before the Board. Mine Design however objects to Votivo's motion to the extent Votivo appears to seek summary judgment based solely on one or more frivolous new arguments¹ (e.g., not presented by Votivo in Votivo's original motion for summary judgment), under the guise of a "motion for reconsideration." Mine Design further objects to Votivo's latest motion since in it Votivo again seeks summary judgment in violation of TBMP § 528.07(b).

Regarding the substance of the Order, Mine Design respectfully notes that when Votivo filed its motion with the District Court, Votivo specifically requested in the motion that "Mine Design should be ordered to dismiss the TTAB Opposition." *See* Votivo's Application For An Order To Show Cause Why Defendant Should Not Be Held In Contempt; Memorandum Of Points And Authorities In Support Thereof at 14:26 (Exhibit 1 to the October 9, 2008 Declaration of Steve Edmiston submitted with Votivo's Motion For Reconsideration, Papers 17-18 in the present Opposition).

¹ In the Motion for Leave Votivo raises new arguments based on terms of the settlement agreement that were not argued in Votivo's original motion for summary judgment. Additionally, the arguments are frivolous because the portions of the Order quoted by Votivo (*see* Votivo's memorandum at 7) and Paragraph 8 of the settlement agreement (*see* Votivo's memorandum at 8-9) are inapposite to the issues raised herein. *Inter alia*, they are merely relevant when Votivo alleges issues of *trademark infringement*. The Order addresses the settlement agreement paragraphs now relied on by Votivo not because of the Opposition, but rather in connection with other arguments made by Votivo in its motion for an order to show cause, in particular Votivo's allegations that the sale of lavender, pomegranate, pear, rosemary, and other scented candles by Mine Design violated the terms of the Injunction. *See* Votivo's Application For An Order To Show Cause Why Defendant Should Not Be Held In Contempt; Memorandum Of Points And Authorities In Support Thereof at 9:25-10:24 (Exhibit 1 to the October 9, 2008 Declaration of Steve Edmiston submitted with Votivo's Motion For Reconsideration, Papers 17-18 in the present Opposition).

In addition, as alleged by Votivo the District Court had before it and considered the same Judgment, Permanent Injunction and settlement agreement now before the Board in the present Opposition. As admitted by Votivo, the District Court declined to issue an order requiring Mine Design to withdraw the present Opposition. *See Votivo's Memorandum In Support Of Motion For Leave at 2.* Unless Votivo can prove the contrary, the Order should be presumed to have conclusively resolved against Votivo any and all defenses Votivo raised or could have raised in the District Court.

Accordingly, since the District Court's decision is binding on Votivo, Mine Design respectfully requests the Board dismiss with prejudice any and all defenses raised by Votivo to which the Order would be applicable, including Votivo's defenses based on said Judgment, Permanent Injunction and/or settlement agreement.

For the foregoing reasons Mine Design respectfully requests the Board enter an order granting Mine Design's motion for summary judgment and denying Votivo's motion for summary judgment.

Dated: April 16, 2009

Respectfully submitted,



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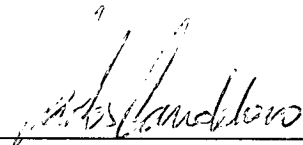
Certificate of Mailing

I hereby certify that a true and complete copy of the foregoing "Plaintiff mine design's Response to Defendant Votivo's Motion for Leave to Supplement Record in Support of Motion for Reconsideration" has been served on Votivo, Ltd. And Votivo LLC by mailing said copy on April 16, 2009, via Express Mail Label No. EB 892218895 US, postage prepaid, to counsel for Votivo, Ltd. and Votivo LLC at:

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The original has been filed on April 16, 2009, by mailing with the United States Postal Service with sufficient postage as First-Class Mail in an envelope addressed to:

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451



Carlos Candeloro

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